IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3505 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NARESH V MEHROTRI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3505 of 1992

MR BP TANNA for Petitioner No. 1

MR UR BHATT, AGP.GOVERNMENT PLEADER for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision:29/07/2004

CAV.JUDGEMENT

1 This petition has been filed under Articles 226 and 227 of the Constitution of India challenging order of removal dated 6/7/1991 made by respondent No.2 against the petitioner, as well as challenging judgment dated

16/3/1992 passed by the Gujarat Civil Services Tribunal, Gandhinagar(the Tribunal) in Appeal No. 261 of 1991.

2 It appears that certain trees on the road side plantation on Padra-Jambusar road were cut and felled. The resultant logs of wood were transported to Bhagwan Saw Mill on 12-13-/6/1988 by one Shri Prahladbhai in the Tractor belonging to him. Necessary panchnamas were drawn in relation to the stump of the trees at the site as well as of the logs of wood lying in Bhagwan Saw Mill. Statements of various persons including labourers involved in cutting the trees, loading and unloading from the tractor, tractor owner, owner of the saw mill, clerk of the office of the petitioner delinquent were recorded during course of the preliminary inquiry. Thereupon, the petitioner, who was working as Range Forest Officer at Padra, District Vadodara in 1989 was served with a chargesheet dated 3/3/1989 by the Deputy Conservator of Forest. The chargesheet contained following three charges in connection with unauthorized felling of green trees on Padra-Jambusar Road :

[i] Regarding unauthorized cutting of green trees of road side plantation on Padra-Jambusar Road with the help of employee Shri J.P.Gohil, Forester, working under you and thus using Government property and causing financial loss to the Government for the purpose of obtaining personal gain.

[ii] Regarding creation of false evidence by manipulation of Government record for personal gain.

[iii] Regarding disobeying the orders of the Superior Authority.

3 The petitioner having denied all the charges levelled against him vide representation dated 31/3/1989, the inquiry was entrusted to the Special Officer for Departmental Inquiry (Non Gazetted), Vadodara. The report of the Inquiry Officer submitted on 31/5/1990 held that charges numbers 2 and 3 out of the aforesaid three charges were proved against the petitioner but in so far as charge No.1 was concerned, the Inquiry Officer accepted the defence of the petitioner. Respondent No.2, who is disciplinary authority, being the Principal Chief Conservator of Forest, Vadodara agreed with the report of the Inquiry Officer in respect to charges numbers. 2 and 3 but in respect to charge No.1 issued a show cause notice to the petitioner dated 5/3/1991 to show cause as

to why the penalty of removal from service should not be imposed for the reasons stated in the notice. The petitioner submitted a detailed reply dated 11/4/1991. However, respondent No.2 removed the petitioner from service by impugned order dated 6/7/1991 (Annexure-F). The petitioner preferred an appeal before the Tribunal and the appeal came to be dismissed on 16/3/1992 (Annexure-G).

4. Mr.B.P.Tanna, learned Senior Counsel, appearing on behalf of the petitioner submitted that the petition had been preferred both under Articles 226 and 227 of the Constitution of India : Impugned order of removal dated 6/7/1991 (Annexure-F) was challenged under Article 226 of the Constitution of India, while impugned judgment of the Tribunal dated 16/3/1992 (Annexure-G) was challenged under Article 227 of the Constitution. The main grounds of challenge are :

[a] The impugned order and the judgment of the Tribunal are based on presumptions and inferences not warranted by the facts of the case.

[b] That they suffered from patent error of law and facts on record.

[c] That joint statements of labourers recorded during preliminary inquiry amounted to irregularity as held by the Tribunal and, hence, the Tribunal ought to have allowed the appeal.

[d] Shri J.P.Gohil, co-accused in the departmental inquiry was not examined as a witness, thus vitiating the inquiry.

[e] The testimony of Shri Jivraj Patel was erroneously disbelieved.

[f] The panchnama, an important document was drawn in absence of Shri Jivraj Patel.

[g] Joint inquiry against petitioner Shri J.P.Gohil was bad in law and in clear breach of legal principles.

[h] Even if such joint inquiry was permissible, Shri Gohil was visited with a lighter punishment of stoppage of increment. Thus, there was violation of Articles 14 & 16 of the Constitution of India. Alternatively, the punishment imposed upon the

petitioner was excessive and disproportionate.

[i] The judgment of the Tribunal is perverse in as much as it has failed to appreciate that the present was a case of no evidence.

5 Elaborating on the aforesaid grounds, the learned Counsel for the petitioner submitted that there was violation of principles of natural justice in as much as the Disciplinary Authority, viz. respondent No.2, had rejected the submission made by the petitioner in reply to show cause notice and had brushed aside the same without dealing with the same. Thus, the submission proceeded, that there was no application of mind reflected in the order. The learned Counsel relied on decision of this Court in case of Siddharth Mohanlal Sharma Vs. South Gujarat University, 1982(1) GLR 233, in support of the proposition that this was a case of "no evidence" and mere suspicion even if honestly and bonafide entertained on the basis of apparently cogent circumstances, is held to be out of bounds even in domestic inquiries, where the principle that in punishing the guilty scrupulous care must be taken to see that the innocents are not punished.

5.1 The decision of the Apex Court in the case of Managing Director, ECIL, Hyderabad & Others Vs. B.Karunakar and others, 1993(4) SCC 727 was relied upon for the purpose of submitting that departmental proceedings must be just, fair and reasonable, principles of natural justice apply with equal rigor; no decision prejudicial to a party should be taken without affording an opportunity or supplying the material which is the basis for the decision, and this is what was meant by 'evidence' in the Proviso to Article 311(2) of the Constitution. That the inquiry from the stage of the chargesheet till stage of punishment was a continuous one and cannot be split into two. That the disciplinary Authority has an objective duty and adjudicatory responsibility to consider and impose proper penalty consistent with the magnitude or the gravity of the misconduct.

5.2. The decision in the case of Institute of Chartered Accountants of India Vs. L.K.Ratna and others, 1986(4)SCC 537 and 1999(1) SCC 45 were referred to and relied upon to emphasis the role of disciplinary authority and the rule of Audi alteram partem.

5.3. The decision in case of S.Ramanathan Vs. Chief Judicial Magistrate, Chengalpattu and others, (2002)10

SCC 473 was relied upon in support of the proposition that the appellate order dismissing the appeal by merely observing that the charges were sufficiently established and there was no reason to interfere with the punishment was not a speaking order and hence cannot be sustained.

5.4. The Apex Court in the case of Kumaon Mandal Vikas Nigam Ltd. Vs. Giraja Shankar Pant & Others, (2001)1 SCC 182 was pressed into service for the purpose of submitting that principles of natural justice required that the object is not only to secure justice but to prevent miscarriage of justice and is synonymous with fairness viz. fairness in procedure.

6 It was therefore submitted that impugned order dated 6/7/1991 suffers from the vice of non-observance of the principles of natural justice, was a non speaking order, did not reflect application of mind and was thus an order which no reasonable man would pass on the facts and evidence on record. The same was therefore liable to be quashed and set aside in exercise of writ jurisdiction under Article 226 of the Constitution of India. It was further submitted that the impugned judgment of the Tribunal dated 16/3/1992 confirming the aforesaid order of disciplinary authority was also bad in law for the same reasons and was thus liable to be quashed and set aside under Article 227 of the Constitution of India.

7. During the course of hearing the Court enquired of the learned Counsel as to whether the impugned order of the disciplinary authority survive as an independent order in light of the appellate order of the Tribunal, that is, whether there was no merger which would enable the petitioner to raise two separate challenges. It was submitted that in light of the principles relating to doctrine of merger laid down in cases of :

[i] State of Madras Vs. Madurai Mills Co.Ltd., AIR 1967 SC 681 -

[ii] Amba Bai and others Vs. Gopal and others,(2001)5 SCC 570 at page 576.

[iii] S.Shanmugavel Nadar Vs. State of T.N.and Another, 2002(8)SCC 361.

It is not a doctrine of rigid and universal application whether there was merger or not would depend upon the subject matter of the order of superior

authority.

8 In the case of Kunhayammed and others Vs. State of Kerala and another, (2000)6 SCC 359, the Supreme Court has reiterated the principles thus :

"7. The doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times.

8. In CIT v. Amritlal Bhogilal and Co.(AIR 1958 SC 868 : [1958] 34 ITR 130) this Court held :

'There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellant authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement'.

9. However, in the facts and circumstances of the case this Court refused to apply the doctrine of merger. There, an order of registration of a firm was made by the Income Tax Officer. The firm was then assessed as a registered firm. The order of assessment of the assessee was subjected to appeal before the Appellate Commissioner. Later on the order passed by the Income Tax Officer in respect of registration of the firm was sought to be revised by the Commissioner of Income Tax. Question

arose whether the Commissioner of Income Tax could have exercised the power of revision. This Court held that though the order of assessment made by the ITO was appealed against before the Appellate Commissioner, the order of registration was not appealable at all and therefore the order granting registration of the firm cannot be said to have been merged in the appellate order of the Appellate Commissioner. While doing so this Court analysed several provisions of the Income Tax Act so as to determine the nature and scope of relevant appellate and revisional powers and held if the subject-matter of the two proceedings is not identical, there can be no merger. In State of Madras v. Madurai Mills Co.Ltd.(AIR 1967 SC 681 : [1967] 19 STC 144) this Court held that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application or the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

10. In Gojer Bros.(P) Ltd. v.Ratan Lal Singh (1974) 2 SCC 453 : AIR 1974 SC 1380) this Court made it clear that so far as merger is concerned on principle there is no distinction between an order of reversal or modification or an order of confirmation passed by the appellate authority. In all the three cases the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision- whether of reversal or modification or only confirmation . Their Lordships referred to an earlier decision of this Court in U.J.S. Chopra v. State of Bombay (AIR 1955 SC 633 :1955 Cri.LJ1410) wherein it was held :

'A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties..... would replace the judgment of the lower court,

thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the court below'.

11. In S.S.Rathore v State of M.P. (1989) 4 SCC 482 : 1990 SCC (L&S)50 : (1989)11 ATC 913:AIR 1990 SC 10) a larger Bench of this Court (Seven Judges) having reviewed the available decision of the Supreme Court on the doctrine of merger, held that the distinction made between courts and tribunals as regards the applicability of doctrine of merger is without any legal justification; where a statutory remedy was provided against an adverse order in a service dispute and that remedy was availed, the limitation for filing a suit challenging the adverse order would commence not from the date of the original adverse order but on the date when the order of the higher authority disposing of the statutory remedy was passed. Support was taken from doctrine of merger by referring to CIT v.Amritlal Bhogilal & Co. (1974)2 SCC 453:AIR 1974 SC 1380) and several other decisions of this Court.

12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or which could have been laid shall have to be kept in view.

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42. 'To merge' means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol.LVII, pp.1067-68)".

9 Applying the aforesaid principles to the facts of the case, it is apparent that the order of the disciplinary authority stands merged in the order of the Tribunal. The Tribunal has while dismissing the appeal, in the penultimate paragraph observed "therefore, there is no question to interfere with the findings of the disciplinary authority". Thus, this is not a case where the superior forum has assigned reasons independent of the reasons assigned by the subordinate forum. To the contrary, the findings of the subordinate forum viz. disciplinary authority have been accepted and confirmed while dismissing the appeal. The doctrine of merger applies with full force in the facts of the case and therefore the only question that would survive is as to whether the impugned judgment of the Tribunal suffers from any patent error to permit this Court to exercise jurisdiction under Article 227 of the Constitution.

10 As to what is the scope of the jurisdiction conferred on the High Court under Article 227 of the Constitution is very succinctly stated by the Apex Court in the case of Sadhna Lodh Vs. National Insurance Co.Ltd. & Anr, 2003(3)SCC 524 in the following words :

"7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or

tribunal purports to have passed the order or to correct errors of law in the decision."

11 Applying the aforesaid principles to the facts of the case it is not possible to state that the Tribunal has exercised jurisdiction not vested in it, and therefore, even if there could be an error apparent on the face of the record or an error of law the scope of supervisory jurisdiction does not permit the High Court to correct the same. The High Court is also not required to act as an appellate Court and as a consequence it is not possible to review or reweigh the evidence upon which the Tribunal has passed the order.

12 Alternatively, even if for a moment it is accepted that the Court is required to exercise jurisdiction under Article 226 of the Constitution and consider the legality of the order (Annexure-F) made by the Disciplinary Authority the following principles have to be borne in mind before undertaking such an exercise.

13 In the case of Lalit Popli Vs. Canara Bank and others, 2003(3) SCC 583, in context of exercising jurisdiction under Article 226 of the Constitution while dealing with a petition challenging the disciplinary proceedings the Supreme Court has enunciated the law thus :

"16. It is fairly well settled that the approach and objective in criminal proceedings and the disciplinary proceedings are altogether distinct and different. In the disciplinary proceedings the preliminary question is whether the employee is guilty of such conduct as would merit action against him, whereas in criminal proceedings the question is whether the offences registered against him are established and if established what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial are conceptually different.(See State of Rajasthan Vs.B.K.Meena - (1996)6 SCC 417 : 1996 SCC(L&S) 1455). In case of disciplinary enquiry the technical rules of evidence have no application. The doctrine of 'proof beyond doubt' has no

application. Preponderance of probabilities and some material on record are necessary to arrive at the conclusion whether or not the delinquent has committed misconduct.

17. While exercising jurisdiction under Article 226 of the Constitution the High Court does not act as an appellate authority. Its jurisdiction is circumscribed by limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice. Judicial review is not akin to adjudication of the case on merits as an appellate authority.

18. In B.C.Chaturvedi v. Union of India (1995) 6 SCC 749: 1996 SCC(L&S)80:(1996)32 ATC 44), the scope of judicial review was indicated by stating that review by the court is of decision-making process and where the findings of the disciplinary authority are based on some evidence, the court or the tribunal cannot reappreciate the evidence and substitute its own finding.

19. As observed in R.S.Saini v. State of Punjab (1999) 8 SCC 90 : 1999 SCC (L&S) 1424) in paras 16 and 17 the scope of interference is rather limited and has to be exercised within the circumscribed limits. It was noted as follows :(SCC p.96)

'16. Before adverting to the first contention of the appellant regarding want of material to establish the charge, and of non-application of mind, we will have to bear in mind the rule that the court while exercising writ jurisdiction will not reverse a finding of the inquiring authority on the ground that the evidence adduced before it is insufficient. If there is some evidence to reasonably support the conclusion of the inquiring authority, it is not the function of the court to review the evidence and to arrive at its own

> independent finding. The inquiring authority is the sole judge of the fact so long as there is some legal evidence to substantiate the finding and the adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the court in writ proceedings.

17. A narration of the charges and the reasons of the inquiring authority for accepting the charges, as seen from the records, shows that the inquiring authority has based its conclusions on materials available on record after considering the defence put forth by the appellant and these decisions, in our opinion, have been taken in a reasonable manner and objectively. The conclusion arrived at by the inquiring authority cannot be termed as either being perverse or not based on any material nor is it a case where there has been any non-application of mind on the part of the inquiring authority. Likewise, the High Court has looked into the material based on which the enquiry officer has come to the conclusion, within the limited scope available to it under Article 226 of the Constitution and we do not find any fault with the findings of the High Court in this regard.'

14. Applying the aforesaid tests if the facts of the present case are examined it is apparent that charge No.1 and charge No.2 are not only interlinked but have a direct bearing on the final conclusion in the departmental proceedings. The Inquiry Officer has failed to appreciate the connection between the two, while the Disciplinary Authority has considered the same. Charge No.2 pertained to manipulation of government record viz. outward register wherein entry No.111A was interpolated between entry numbers 111 & 112. The Inquiry Officer records finding that this was done to ensure that communication of first information report which was belated viz. made on 17/6/1988 was sought to be shown as having been made on 11/6/1988, because that was the date on which the report had been prepared. This was obviously done with a view to show that the delinquent petitioner had acted in furtherance of the responsibility cast on him to protect the government property viz. the

road side plantation trees. However admittedly, the same had already been cut, felled and transported to Bhagwan Saw Mills on 15/6/1988 as recorded in the panchnama. Thus, with a view to save his own skin the petitioner delinquent had sought to manipulate the government records and interpolated the entries in the register as deposed by Shri Malik, the Clerk of the office of the petitioner. Once the Departmental Inquiry Officer had accepted this position, based on evidence on record, the immediate question that would arise is : as to why was the petitioner required to create such a false evidence by interpolating entry in the government records? The answer is not far to seek. As could be seen from the statement of Shri Prahladbhai Ranchhodbhai Mistri, owner of the Tractor, the petitioner had paid Rs.300/- to the said witness for transporting the felled trees from the road side to Bhagwan Saw Mills. The statement not only remains unshaken but gets confirmed in the cross-examination undertaken on behalf of the petitioner when Shri Prahladbhai specifically states that the payment was made at the rate of Rs.100/per trip and the felled trees were transported in three trips.

15. In the circumstances, the Disciplinary Authority was fully justified in issuing show cause notice to the petitioner and, after considering the explanation tendered, in passing the impugned order dated 6/7/1991 (Annexure-F) which is confirmed by the Tribunal by judgment dated 16/3/1992 (Annexure-G). Hence, in light of the facts and evidence on record it is apparent that on preponderance of probabilities the Disciplinary Authority and the Tribunal were justified in arriving at the conclusion that the delinquent had committed misconduct he was charged with and there is some material on record so as to justify such a conclusion. There is no error in the decision making process of the Disciplinary Authority or the Tribunal and it is not permissible for this Court to undertake reappreciation of evidence. The scope of interference is limited and the Court cannot arrive at an independent finding after reweighing the evidence as contended on behalf of the petitioner. The impugned order and the judgment show that the Disciplinary Authority and the Tribunal have based their conclusions on material available on record and after considering the defence putforth by the petitioner, and such decisions have been arrived at in a reasonable manner and objectively. It is not possible to term the decisions as either being perverse or not based on any material, nor is it a case where it can be said that there is non application of mind. In the circumstances, no fault can be found with the impugned

order of the Disciplinary Authority and the judgment of the Tribunal.

16 The only question that would then survive is whether it can be stated that penalty imposed is proper and consistent with the magnitude or the gravity of the misconduct. Here also the position is well settled that each case must be considered in the light of its own scenario. The Disciplinary Authority and the Tribunal are justified in finding that the petitioner who was Range Forest Officer at Padra was holding a public post which was a position of trust and in the course of discharge of his duties it was required that he should be accountable and responsible and conducts himself in that manner. That he was in charge of or custodian of Government property which required him to safeguard the public interest. He having failed to perform his duties in such a manner and having acted in dealing with the Government property for the purpose of obtaining personal gain it is not possible to accept the contention raised on behalf of the petitioner that the punishment imposed upon the petitioner is either excessive or disproportionate to the charges proved against him.

17. In the circumstances, the petition is hereby rejected. Rule is discharged with no order as to costs.

Sd/-

(D.A.Mehta,J)

m.m.bhatt